UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

UNITED STATES OF AMERICA,

v. 15 Cr. 643 (PKC)

GARY HIRST,

Defendant.

------------------------------x

September 28, 2016
10:00 a.m.

Before:

HON. P. KEVIN CASTEL

District Judge
and a Jury

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: BRIAN R. BLAIS
AIMEE HECTOR
REBECCA G. MERMELSTEIN
Assistant United States Attorneys

SHER TREMONTE LLP
Attorneys for Defendant
BY: MICHAEL TREMONTE
JUSTINE A. HARRIS
NOAM KORATI BIALE

ALSO PRESENT:
ELLIE SHEINWALD, Paralegal
GARY SMITH, Paralegal

(Trial resumed; jury not present)

THE COURT: We have a note from the jury which has been marked as Exhibit 14. "Your Honor, may the jury please have a detailed description of wire fraud?" And it's signed by the foreperson. It was received at or about 1:00 and has been shown to counsel on both sides.

Let me hear from the government.

MS. HECTOR: Your Honor, if I may. We've looked at the note. We understand that the jury does have a copy of the jury instructions which, in fact, does provide a fairly detailed description of wire fraud. So we don't know that there's anything more to do except perhaps ask the jury if they have a more specific question to pose, and then we may be able to address that, but that's about as much as we would suggest doing at this point.

THE COURT: Thank you.

The defense.

MR. TREMONTE: Your Honor, the question in the note, at least the way it's phrased on its face, suggests that they may not be aware that they have a detailed description of wire fraud, so we think -- we agree it's appropriate to point them to it to make sure they know they have it, and if there's a follow-up question, I expect we'll get it from them.

THE COURT: What I propose to do is have the jury come in and reread to them from the bottom of page 49 of Court

Exhibit 8, Count Four, wire fraud, through to and including the top of 59, the carryover line that says "national lines" and read that to them anew.

Any objection from the government?

MS. HECTOR: No objection, your Honor.

THE COURT: Any objection from the defense?

MR. TREMONTE: No objection, your Honor.

THE COURT: Please bring our jurors in.

(Jury present)

THE COURT: Good afternoon, ladies and gentlemen.

JURORS: Good afternoon.

THE COURT: I have your note signed by your foreperson. "Your Honor, may the jury please have a detailed description of wire fraud." After consulting with counsel, this is what I advise you.

Count Four of the indictment charges defendant, Gary Hirst, with committing the substantive offense of wire fraud from at least in or about 2009 through in or about 2011. Wire fraud is also the object of the conspiracy charged in Count Three of the indictment.

Count Four charges that the defendant, Gary Hirst, committed wire fraud in connection with the issuance of shares by Gerova and the disclosures or lack of disclosures to the investing public regarding Gerova. In order to prove the defendant guilty of wire fraud, the government must separately establish beyond a reasonable doubt the following three elements:

First, that in or about the times alleged in the indictment, there was a scheme or artifice to defraud others of the money or property by false or fraudulent pretenses, representations, or promises.

Second, that the defendant knowingly and willfully devised or participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with the specific intent to defraud.

Third, that in the execution of that scheme, the defendant used or caused the use by others of interstate or foreign wires.

The first element, as I said, is that the government must prove beyond a reasonable doubt the existence of a scheme or artifice to defraud others of money or property by means of false or fraudulent pretenses, representations, or promises. A scheme or artifice is simply a plan for the accomplishment of an object.

Fraud is a general term. It's a term that includes all the possible means by which a person seeks to gain some unfair advantage over another person by false representations, false suggestions, false pretenses, or concealment of the truth. The unfair advantage sought can involve money, property, or any other thing of value. Thus, a scheme to defraud is any plan, device, or course of action to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

It is a plan to deprive another of money or property by trick, deceit, deception, or swindle. In order to establish a scheme to defraud, the government need not show that the defendant made a misrepresentation. A scheme to defraud can exist even if the scheme did not progress to the point where misrepresentations would be made. In addition, even if you find that the statements the government contends were made or contemplated by the defendant in furtherance of the scheme were literally true, you can still find that the first element of the wire fraud statute has been satisfied if the statements and/or conduct of the defendant were deceptive.

You may also find the existence of such a scheme if you find that the defendant conducted himself in a manner that departed from traditional notions of fundamental honesty and fair play in the general business life of society.

A scheme to defraud need not be shown by direct evidence, but may be established by all circumstances and facts in the case.

A pretense, representation, or statement is fraudulent if it was made falsely and with intent to deceive. A statement may also be fraudulent if it contains half-truths or if it conceals material facts in a manner that makes what is said or represented deliberately misleading or deceptive.

The failure to disclose information may also constitute a fraudulent representation if the defendant was under a legal, professional, or contractual duty to make such a disclosure, the defendant actually knew such disclosure was required to be made, and the defendant failed to make such disclosure with the intent to defraud.

The false or fraudulent representation or concealment must relate to a material fact or matter. I have previously explained that a material fact is one that would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision. That means, if you find a particular statement or representation to be false, you must determine that the statement or representation was one that a reasonable person might have considered important in making his or her decision. The same principle applies to fraudulent half-truths or omissions; that is, failure to disclose facts.

In order to satisfy this element, the government must also prove that the alleged scheme contemplated depriving another of money or property. It is not necessary for the government to establish that the defendant actually realized any gain from the scheme or that any particular person actually suffered any loss as a consequence of the fraudulent scheme. You must concentrate on whether there was such a scheme, not on the consequences of the scheme.

In this regard, a person is not deprived of money or property only when someone directly takes his money or property from him; rather, a person is also deprived of money or property when important information is withheld from that person or when the person is provided false or fraudulent information that, if believed, would prevent him from being able to make informed, economic decisions about what to do with his money or property.

In other words, a person is deprived of money or property when he is deprived of the right to control that money or property, and he's deprived of the right to control that money and property when important information is withheld from him or where he receives false or fraudulent statements that affect his ability to make discretionary, economic decisions about what to do with that money or property.

Again, the government need not show that any victim investor lost money or property as a result of the scheme. Such a loss must, however, have been contemplated by the defendant. To put it another way, it is not necessary that the defendant have intended that his misrepresentations or omissions would cause an actual loss, it is sufficient that the defendant intended that the misrepresentations or omissions would induce the victim to enter into the transaction without the relevant facts necessary to make an informed, economic decision.

If you find the government has sustained its burden of proof that a scheme to defraud did exist as charged in the indictment, you should next consider the second element.

The second element of wire fraud that the government must establish beyond a reasonable doubt is that the defendant devised or participated in the fraudulent scheme knowingly, willfully, and with the specific intent to defraud. The words "devised" and "participated" are words that you are familiar with and, therefore, I do not need to spend much time defining them.

To devise a scheme to defraud is to concoct or plan it. To participate in a scheme to defraud means to associate oneself with it with a view and intent towards making it succeed. While a mere on-looker is not a participate in a scheme to defraud, it is not necessary that a participant be someone who personally and visibly executes the scheme to defraud. In order to satisfy this element, it is not necessary for the government to establish that the defendant originated the scheme to defraud. It is sufficient if you find that a scheme to defraud existed even if originated by another and that the defendant, while aware of the scheme's existence, knowingly participated in it.

It is also not required that the defendant participated in or have knowledge of all of the operations of the scheme. The guilt of the defendant is not governed by the extent of his participation. Also, it is not necessary that the defendant participated in the alleged scheme from the beginning. A person who comes in at a later point with knowledge of the scheme's general operation, although not necessarily all of its details and intentionally acts in a way to further the unlawful goals, becomes a member of the scheme and is legally responsible that all that may have been done in the past in furtherance of the criminal objective and all that is done thereafter. Even if the defendant participated in the scheme to a lesser degree than others, he is nevertheless equally guilty so long as he became a member of the scheme to defraud with knowledge of its general scope and purpose.

As I have previously noted before, the defendant may be convicted of the fraud charged here, he must also be shown to have acted knowingly and willfully with a suspect intent to defraud.

Now, you heard previously the definitions of "knowingly" and "willfully", and I need not repeat them here.

A defendant acts with specific intent to defraud if he engages or participates in the fraudulent scheme with some realization of its fraudulent or deceptive character and with an intention to be involved in the scheme to defraud, and to help it succeed with a purpose of causing harm to the victim.

The government need not prove that the intended victims were actually harmed, only that such harm was contemplated. Actors are presumed to intend the natural and probable consequences of their actions. So when the necessary result of the actor's scheme is to injury others, fraudulent intent may be inferred from the scheme itself. The question of whether a person acted knowingly, willfully, and with a specific intent to defraud is a question of fact for you to determine, like any other fact question.

This question involves one's state of mind. As I explained before, direct proof of knowledge, willfulness, and fraudulent intent is almost never available. Indeed, it would be a rare case where it could be shown that a person wrote or stated that, as of a given time in the past, he or she committed an act with fraudulent intent. Such direct proof is not required. The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence based upon a person's outward manifestations, words, conduct, acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom.

What is referred to as drawing inferences from circumstantial evidence is no different from what people normally mean when they say "use your common sense". Using your common sense means that when you come to decide whether the defendant possessed or lacked an intent to defraud, you need not limit yourself to just what the defendant said, but you may also look at what the defendant did and what others did in relation to the defendant and, in general, everything that occurred.

Also, as I instructed you in regard to Count Two, I remind you that good faith, as I previously defined the term, is a complete defense to a charge of wire fraud. A defendant has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent or consequent lack of good faith beyond a reasonable doubt.

Please also keep in mind, however, that as I have previously instructed you, that a belief by the defendant, if such belief existed, that ultimately everything would work out so that no investors would lose any money or that particular investments would ultimately be financially advantageous for clients does not necessarily constitute good faith. No amount of honest belief on the part of a defendant that the scheme will ultimately make a profit for the investors will excuse fraudulent actions or false representations by him.

The third and final element that the government must establish beyond a reasonable doubt as to wire fraud is that interstate or foreign wire facilities were used in furtherance of the scheme to defraud. The interstate or foreign requirement means that the wire communications must pass between two or more states as, for example, a transmission of computer signals between New York and another state, for example New Jersey, California, or a territory of the United States, such as the Virginia Islands, or between the United States and another country.

It is not necessary for the defendant to be directly or personally involved in any wire communication as long as the communication is reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating. In this regard, it would be sufficient to establish this element of the crime if the evidence justifies a finding that the defendant caused the wires to be used by others, and this does not mean that the defendant himself must have specifically authorized others to execute a wire communication. When one does an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use of the wires can reasonably be foreseen, even though not actually intended, then he causes the wires to be used.

Incidentally, this wire communication requirement is satisfied even if the wire communication was done by a person with no knowledge of the fraudulent scheme, including even a victim of the alleged fraud.

The use of the wire need not itself be fraudulent. Stated another way, the wire communication need not contain any fraudulent representation or even any request for money. It is sufficient if the wires were used to further or assist in carrying out the scheme to defraud. Let me also add the following:

Only the wire communication must be reasonably foreseeable, not its interstate or foreign component. Thus, if you find that the wire communication was reasonably foreseeable and the interstate or foreign wire communication actually took place, then this element is satisfied even if it was not foreseeable that the wire communication would cross state or national lines.

This concludes my instruction on wire fraud.

Now, in reading this to you, it's in the context of all the instructions I gave you throughout the trial, including at the end of the case. You should consider all of my instructions. But I've highlighted those that relate specifically to wire fraud.

Thank you, ladies and gentlemen. You may return to the jury room.

(Jury not present)

THE COURT: Anything from the government?

MS. HECTOR: Nothing, your Honor. Thank you.

THE COURT: Anything from the defendant?

MR. TREMONTE: Your Honor, it just occurs to us that it may somehow be that the jurors are not aware that they have a copy of the charge. My understanding, which may be mistaken, is that they were provided with one copy.

THE COURT: They were.

MR. TREMONTE: So I raise that as a possibility.

THE COURT: I don't think there's any confusion. I told them I was giving them a copy. They're bright people. If they didn't receive a copy, they would have let us know. Further, it's not essential that they receive a copy. It may well be that this is how they resolve the question in their mind. They put it the way they put it. I've responded the way I've responded.

Anything further from the defendant?

MR. TREMONTE: Nothing, your Honor.

THE COURT: Thank you all.

(Recess pending verdict)

THE COURT: I have a note which has been marked as Court Exhibit 15. "Your Honor, the jury has reached a verdict." It's signed by the foreperson, 2:58, and I also have an envelope that was delivered.

Please bring our jurors in.

(Continued on next page)

(Jury present)

THE COURT: Mr. Foreperson, has the jury reached a verdict?

THE FOREPERSON: Yes.

THE COURT: Is it unanimous?

THE FOREPERSON: Yes.

THE COURT: And is it signed and dated?

THE FOREPERSON: Yes.

THE COURT: Madam Deputy, if you will please return this to the foreperson and take the verdict.

If you'll please stand, sir.

THE DEPUTY CLERK: On Count One, conspiracy to commit securities fraud; guilty or not guilty.

THE FOREPERSON: Guilty.

THE DEPUTY CLERK: On Count Two, securities fraud; guilty or not guilty?

THE FOREPERSON: Guilty.

THE DEPUTY CLERK: On Count Three, conspiracy to commit wire fraud; guilty or not guilty?

THE FOREPERSON: Guilty.

THE DEPUTY CLERK: On Count Four, wire fraud; guilty or not guilty?

THE FOREPERSON: Guilty?

THE COURT: Please return the verdict sheet to the deputy, and Madam Deputy, if you would please poll the jury.

(Jury polled; each juror answered in the affirmative)

THE COURT: Any objection from the government to my discharging the jury?

MR. BLAIS: No, your Honor.

THE COURT: Any objection from the defendant to my discharging the jury?

MR. TREMONTE: No, your Honor.

THE COURT: Ladies and gentlemen, you are discharged from your service as jurors.

I want to tell you about a judge who served on this court by the name of Edward Weinfeld. He was a very highly respected judge, and he had a very unusual custom at the end of a jury trial; he would look at the jury and say, "I will not thank you for your service." Everybody thought that was rather odd. But then he would go on to explain that to do so is to cheapen what you've done. You did not come here to do me a favor, to do the government a favor, to do the defendant a favor, you came here because jury service is one of the highest obligations of citizenship. It's the direct participation in our system by citizens. It is enormously difficult work.

You now know this. You know what it's like to come every day and put aside everything else in your life and listen to the evidence and do your very best to follow it and to listen and to give everybody a fair shake. The system can't work without you.

Think about it. If we had a different system and we had people with black robes deciding guilt or not guilt, there would always be a question in somebody's mind, well, who is that person? Where did he grow up? Where did she grow up? Who appointed them? What's their background? It would always be somewhat suspect in the minds of some people.

But you take 12 people from different parts of the area and you bring them together, and many of you are people who would have lived your entire life on this planet with never having met one another, never having crossed paths, and when you bring 12 people together, total strangers, and they come together and reach a unanimous verdict, that is the best we can do to try and reach a fair and just result, it's an extraordinary system we have. As a direct participant in it, you, for the rest of your lives, should have pride in what you did.

I would say the exact same thing to you if your verdict were a different verdict. It has nothing to do with the verdict in this case. That's utterly irrelevant to me. But the fact that you came together and worked so hard to come to a verdict is, to use a sometimes overused word, it's awesome. I'm in awe of it every time I see it.

I do have two requests of you. Two favors. It seems crazy to say it, but it looks to me like we're coming up on Thanksgiving and the fall holidays. You're going to see your cousins, your family members, your neighbors, and if you're like most people, there's a good chance that, in the course of talking to them, somebody's going to tell you how they plan to beat their way out of jury duty or how they just beat their way out of jury duty. I don't want you to be mean to anybody, but I want you to think of me and think of your own service and let them know that you don't find that one bit funny. It would be like somebody telling you that they cheated on their income tax or they defrauded somebody or they stole something. There's nothing funny about evading jury service. So in a polite, nice way, let them know that that's how you feel because you realize how truly important it is.

The other thing is, life is a little bit strange, and it's entirely possible that we may be on a subway together or at Madison Square Garden, or who knows where, and you may see me. I hope you'll come up to me and remind me of how we met. I will remember you, ladies and gentlemen.

Another point. You're now free to discuss the case with anybody you choose, to tell them anything you want about the case. I will tell you what many jurors have found appropriate. They are happy to tell everybody about what they saw in the courtroom, about the fine lawyers, about the witnesses, about the handsome judge, whatever you want to say, and the wonderful people they met on the jury. But what was said during the course of deliberations, some people find is something special and private that you 12 may choose to keep among yourselves. That's your decision, but I'll tell that you that's what some jurors have found they want to do.

So ladies and gentlemen, with the utmost of admiration for your response to the call to service and your service, you are now discharged from jury service. I hope we meet again.

(Jury discharged)

THE COURT: The verdict has been marked as Court Exhibit 16. The clerk will give us a date for sentencing.

THE DEPUTY CLERK: February 3rd at 11:30.

THE COURT: Is there anything further from the government?

MR. BLAIS: Yes, your Honor. Pursuant to 18 United States Code, Section 3143(a)(1), the government would move for remand pending sentence.

Now that the jury has returned a verdict of guilty, first of all, there is now presumption of detention unless it can be rebutted by evidence that the defendant does not pose a danger to the community and does not pose a risk of flight.

We certainly do not contend he poses any danger to the community, but certainly the incentives for flight have changed substantially in light of the jury's verdict. He is now facing a guidelines range of approximately 10 years or so. In addition, as your Honor may or may not recall, he is also facing another indictment in this district on a case that is pending before Judge Abrams relating to the Indian Tribal Bond matter that your Honor, I know, is familiar with from the detention hearing regarding Mr. Galanis. That is a fraud of approximately the same magnitude, at least his involvement in the fraud as we allege is of approximately the same magnitude, so he would be facing a similar guidelines range in that, to the extent there's a conviction in that matter, as well.

So he has incentives to flee, given that he's facing approximately a 10-year guidelines range and the prospect of potentially another 10 years or so guidelines range. Certainly, we believe, in light of the presumption of detention, it is not something that can be overcome in this case.

So your Honor has the basic facts. He is currently on a $1 million bond secured by three financially responsible persons, $200,000 of equity in a property, he's subject to strict pretrial supervision, and his travel is limited to various districts, and he obviously has surrendered his passport.

THE COURT: What do you know about the defendant's financial resources?

MR. BLAIS: We understand, and I think this was confirmed through the testimony of Mr. Hirst's daughter, that he's currently living with his daughter at her home in Florida. We don't understand him to have independent property that he's residing in. I think what we were advised, at least in his proffer, was that that situation of him living with his daughter was, in part, prompted by his lack of financial resources.

THE COURT: Let me hear from the defendant.

MR. TREMONTE: Your Honor, I don't think it's appropriate that he's remanded pending sentencing. Mr. Hirst, I don't think that his incentives have changed very substantially. He was facing the guidelines range before on this case, he's facing a serious sentencing range, potentially, on the second case. Mr. Hirst has unfailingly complied with all of the conditions of pretrial release, he has unfailingly shown up for every court appearance, and there's just no indication that that will change pending sentencing. So for those reasons, your Honor, we don't believe that the incentives have changed.

His family members, including his children, are signatories on the very substantial million dollar bond in this case, as well as an equal amount in the other case.

THE COURT: How much property has been posted?

MR. BLAIS: $200,000, your Honor.

THE COURT: In total?

MR. BLAIS: It's property with $200,000 of equity.

THE COURT: Who posted that?

MR. TREMONTE: I believe the defendant did. Yes, your

Honor. Just to be clear, the property posted was cash, which was deposited with the clerk. Your Honor, if the Court believes that additional safeguards are necessary, we can confer with Mr. Hirst's children and secure the bond with additional -- we can enlarge the bond and also secure it with additional property. Of course, it would take a little bit of time to put together, but not much, your Honor.

THE COURT: I will reserve decision and I'll be back shortly. Just take a brief recess. Thank you.

(Recess)

THE COURT: Having considered the application of the government and having examined the terms of Section 3143, I conclude that the bail in this case should be modified to increase the amount of the bond to $3 million, and to increase the amount of property to be posted to $1 million. Until these additional requirements are fully satisfied, I cannot find by clear and convincing evidence that the person, the defendant who now stands convicted of four felonies, is not likely to flee given the length of time that he's facing. So accordingly, the defendant is remanded to the custody of the United States Marshal until such time as the modified bail conditions are satisfied. I will enter an order to that effect.

MR. TREMONTE: Your Honor, may with he have a few moments to confer with our client about that?

THE COURT: I'm completing an order. If you want to confer with anybody you'd like to confer with, you're welcome to do that. That's my ruling.

MS. HARRIS: Your Honor, just for clarification, with respect to the additional property, that's with respect to either real property that's valued at that additional amount or cash, correct?

THE COURT: It's got to be property of the value bringing it up to a total value of $1 million. Whether it's cash, securities, or equity in real property does not matter in that regard. From persons who have moral sway over the defendant.

MS. HARRIS: Understood. Your Honor, I think we could contact Mr. Hirst's daughter. Obviously, she's been in regular contact. She owns property of substantial value. We would be prepared to make an appearance in magistrate court if that's more convenient, or before your Honor. If we just take a brief recess, if we can make a phone call to get her agreement, and I understand she would need to sign in the federal court.

THE COURT: Yes. Unless and until it's actually posted, it didn't happen. Okay? So the remand is until such time as it's actually posted. Then when it's posted and the million dollars is in the hands of the clerk, secured by the clerk, then Mr. Hirst can be released.

MR. BLAIS: I also think, as a technical matter, your

Honor, that all three of the individuals who originally cosigned the bond would need to sign it again because the face amount has now increased.

THE COURT: Right. The order will read, "Ordered that the defendant is hereby remanded to the custody of the United States Marshal subject to release when and if a bond in the amount of $3 million is executed by three responsible cosigners secured by $1 million in cash, securities, and/or equity in real property. All other conditions of bail remain in place."

Mr. Marshal, the deputy will provide you with a copy of this order.

Anything further from the government?

MR. BLAIS: Nothing from the government, your Honor.

THE COURT: From the defendant?

MR. TREMONTE: Nothing further, your Honor.

THE COURT: Thank you all very much.

(Trial adjourned)